

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN BEASLEY,

Defendant-Appellant.

UNPUBLISHED

November 16, 1999

No. 199553

Recorder's Court

LC No. 96-005314

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for intentionally pointing a firearm without malice, MCL 750.233; MSA 28.430, and possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to one to five years' imprisonment. We affirm.

Defendant first contends that the verdict was against the great weight of the evidence. We disagree. The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Defendant stipulated to the fact that he was a felon for the purposes of MCL 750.224f; MSA 28.421(6). Because defendant contests only the possession conviction, the issue for consideration is whether defendant possessed a gun. There was conflicting testimony as to whether defendant had a gun; however, it cannot be said that the evidence preponderated heavily against the verdict. If there is conflicting evidence presented at trial, questions of credibility must be left to the trier of fact, unless the testimony supporting the verdict is deprived of all probative value or the factfinder could not believe it. *Id.* at 642-643. No such circumstances exist in this case.

Defendant next argues that the trial court's determination that defendant was in possession of a firearm was "clearly erroneous." We disagree. Clear error exists if, although there is evidence to support a finding, this Court is left with the definite and firm conviction that a mistake has been made. *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993). The trial court's determination that defendant possessed a gun was supported by the testimony of a witness. The court, in its findings of fact and conclusions of law, accurately described that witness' testimony.

Next, defendant contends that questioning by the prosecution constituted prosecutorial misconduct. We disagree. Because defense counsel failed to object to the prosecutor's remarks at trial, we need not consider this issue, absent a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). We do not believe that failure to consider the issue would result in a miscarriage of justice.

Defendant next claims that he was denied the effective assistance of counsel at trial.¹ We disagree. To establish a denial of effective assistance of counsel under the state and federal constitutions, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must have prejudiced the defendant. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *Daniel*, *supra* at 58. In addition, the defendant must overcome the presumption that the challenged conduct was sound trial strategy. *Id.* A defendant must demonstrate that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Stanaway*, *supra* at 687-688. Because there was no *Ginther*² hearing, our review is limited to the facts contained in the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Defendant contends that counsel was deficient because she did not allow him to proceed with a jury, did not allow him to testify, failed to subpoena enough witnesses, failed to object to prosecutorial misconduct and failed to make an argument regarding the lack of credibility of the prosecution's witnesses. However, defendant clearly waived his right to a jury trial. In addition, although defendant did not waive his right to testify on the record, it is obvious that counsel advised defendant against testifying because the same facts had been established by other witnesses and because she did not want defendant's criminal record to be made an issue. Further, defendant's argument that counsel "did not subpoena enough witnesses" is deficient. Defendant failed to cite authority for his position or demonstrate that the additional witnesses would have assisted defendant. Decisions as to what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Rockey*, ___ Mich App ___, ___ NW2d ___ (Docket No. 203462, issued 8/10/99, slip op p 2). Defendant's contention that counsel was ineffective for failing to object to the prosecutor's questioning during trial must fail where the questioning did not constitute misconduct. Counsel was not required to make a meritless objection. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Finally, defendant's claim that counsel was ineffective for failing to make certain arguments regarding credibility at trial must also fail where it is apparent from the record that counsel focused almost exclusively on the witnesses' lack of credibility.

Defendant next argues that he was entitled to a new trial based on a violation of the sequestration order. We disagree. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). Again, this issue was insufficiently briefed by defendant. The two sentences defendant provides as his substantive argument fail to state how the sequestration order was violated. There is no record of any objection to the officer in charge leaving the courtroom.

Finally, defendant claims that the felon in possession statute is unconstitutional because it infringes upon his constitutional right to bear arms. We disagree. The constitutionality of a statute is a question of law which is reviewed de novo on appeal. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997). This Court has already determined that the right to bear arms is not absolute and that the felon in possession statute is constitutional. *Id.* at 375. See also *People v Parker*, 230 Mich App 677, 687; 584 NW2d 753 (1998); *People v Green*, 228 Mich App 684, 692; 580 NW2d 444 (1998).

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Henry William Saad

¹ Although defendant presents this issue as whether the trial court erred in denying defendant a *Ginther* hearing, *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), defendant's underlying contention is one of ineffective assistance of counsel, which we address directly.

² *Ginther*, n 1 *supra*.